

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND J. BROWN and DEPARTMENT OF THE ARMY,
FORT McNAIR, Washington, DC

*Docket No. 99-1262; Submitted on the Record;
Issued January 2, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective June 20, 1998; (2) whether appellant has established a permanent impairment causally related to his December 10, 1980 employment injury which would entitle him to a schedule award under 5 U.S.C. § 8107; and (3) whether the Office properly denied appellant's request for merit review of his claim on October 1, 1998 and January 19, 1999.

On December 10, 1980 appellant, then a 34-year-old painter, filed a claim alleging that on that day he sustained an injury to his back when he slipped and fell while in the performance of duty. Appellant stopped work on December 10, 1980. His claim was accepted by the Office for an employment-related contusion and herniated nucleus pulposus at L5-S1 and he received appropriate compensation for total disability until November 12, 1996, when he returned to work as a service order clerk. In a decision dated November 25, 1996, the Office reduced appellant's compensation benefits to reflect his wage-earning capacity as a service order work. On April 1, 1997 appellant filed a claim for a schedule award.

The record indicates that appellant was treated by Dr. Charles H. Emich, a Board-certified orthopedic surgeon, who opined that appellant continued to have L5 radiculopathy involving his lower extremities, as well as some evidence of peripheral neuropathy possibly related to his diabetes. Dr. Emich further opined that muscle testing revealed lower extremity weakness, causally related to appellant's chronic radiculitis, equating to a 10 percent permanent impairment of the whole body. Appellant was thereafter referred by the Office for examination by Dr. Robert E. Collins, a Board-certified orthopedic surgeon, who opined that, at the time of his examination, there were no objective findings of the accepted herniated disc, and that, while appellant did have some permanent impairment of his back due to the soft tissue injury to the back, with intermittent muscle spasm and pain, he had no impairment of the lower or upper extremities and could work full time without restrictions and without need for further treatment. The Office determined that a conflict in medical opinion was created between Dr. Emich and Dr. Collins and referred appellant for examination by Dr. Sanford H. Eisenberg, a Board-

certified orthopedic surgeon, to serve as the impartial medical specialist.¹ The Office asked Dr. Eisenberg to resolve the issue of whether appellant had any residuals of his accepted L5-S1 herniated disc, and to determine whether he had any permanent impairment for which he would be entitled to a schedule award.

On February 4, 1998 Dr. Eisenberg's secretary advised the Office that Dr. Eisenberg could not conduct the scheduled examination, but that Dr. Chia Ching Liu, a Board-certified orthopedic surgeon and Dr. Eisenberg's associate, would conduct the examination instead. In a report dated February 5, 1998, Dr. Liu set forth appellant's medical and personal history and set forth findings from a physical examination. Following clarification of her opinion, in a March 11, 1998 report, in a decision dated April 16, 1998, the Office denied appellant's claim for a schedule award based on Dr. Liu's opinion that appellant had no permanent impairment causally related to his accepted work injury. In a separate letter dated April 16, 1998, the Office advised appellant that it proposed to terminate his compensation based on the opinion of Dr. Liu that he had no employment-related residuals. By letter dated May 28, 1998, appellant disagreed with the denial of his claim for a schedule award and with the Office's conclusion that he had no residuals of his employment injury, and submitted additional medical evidence in support of his claim.

By decision dated June 25, 1998, the Office terminated appellant's compensation effective June 20, 1998, finding that the weight of medical opinion was represented by the report of Dr. Liu, the impartial medical examiner.

By letter dated September 23, 1998, appellant requested reconsideration of the June 25, 1998 decision and submitted additional evidence in support of his request. In a decision dated October 1, 1998, the Office declined to open appellant's claim for merit review on the grounds that the newly submitted evidence was previously contained in the record, and was therefore repetitious and cumulative and insufficient to warrant reopening the claim. By letter dated October 29, 1998, appellant again requested reconsideration and submitted additional evidence in support of his request. In a decision dated January 19, 1999, the Office found that, as the newly submitted evidence exactly duplicated the evidence accompanying appellant's prior request for reconsideration, it was duplicative and insufficient to warrant reopening the claim for merit review.

The Board finds that the case is not in posture for decision. There remain unresolved conflicts in the medical evidence between the opinions of Dr. Emich, appellant's attending physician and Dr. Collins, the second opinion physician.

In order to resolve the conflicts of medical opinion regarding whether appellant had any residuals of his accepted L5-S1 herniated disc, and whether he had any permanent impairment of his accepted condition for which he was entitled to a schedule award, the Office properly

¹ See 5 U.S.C. § 8123(a); *Marion Thornton*, 46 ECAB 899 (1995).

referred appellant to Dr. Eisenberg, selected as the impartial medical specialist.² However, on February 4, 1998, Dr. Eisenberg's office telephoned the Office to say that Dr. Eisenberg had been hospitalized and his associate, Dr. Liu, would perform appellant's examination. Dr. Liu performed the scheduled examination and the Office found that Dr. Liu's February 5, 1998 report represented the weight of the medical evidence as it was entitled to special weight because Dr. Liu was acting as an impartial medical specialist and her report was sufficient to resolve the conflict in the medical evidence. The Board finds, however, that Dr. Liu may not be considered an impartial medical specialist because she was not appointed by the Office to act as an impartial medical specialist in accordance with procedures established by the Office for the selection of such specialists.

A physician selected by the Office to serve as an impartial medical specialist should be one wholly free to make a completely independent evaluation and judgment. In order to achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced. These procedures, set forth in the Federal (FECA) Procedure Manual provide, in pertinent part, as follows:

"b. *Selection of Physician.* The CE [claims examiner] may use Form CA-19, Request for Specialists Referral (Exhibit 1), to initiate the referral. Unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories....

(1) *The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographic area, and repeating the process when the list is exhausted.*"³ (Emphasis in the original.)

The procedures contemplate that impartial medical specialists will be selected on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.⁴ Because Dr. Liu was not the impartial medical specialist selected by the Office in accordance with its rotating selection procedures, her opinion was improperly obtained.

Although Dr. Liu is Dr. Eisenberg's associate, the Board notes that the record does not demonstrate that Dr. Liu would have been the next physician on the rotation list after

² Section 8123 of the Federal Employees' Compensation Act provides, "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123; *see, e.g., William C. Bush*, 40 ECAB 1064 (1989).

³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (March 1994).

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(a)(3) (March 1994).

Dr. Eisenberg. Therefore, to permit the use of Dr. Liu's medical opinion would undermine the appearance of impartiality or would appear to compromise the integrity of the system for selecting impartial medical specialists.⁵ As Dr. Liu cannot be considered to be an impartial medical specialist in this case, her report may not receive any special weight and there remain unresolved conflicts in medical opinion. Therefore, the Office improperly terminated appellant's compensation benefits effective June 20, 1998 and improperly denied appellant's claim for a schedule award by decision dated April 16, 1998.

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with the Office's procedures. After such further development of the record as it deems necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated January 19, 1999, October 1, June 25 and April 16, 1998 are reversed and the case remanded for further development consistent with this decision.

Dated, Washington, DC
January 2, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

⁵ See *Shirley L. Steib*, 46 ECAB 309 (1994) (where an associate of the physician selected by the Office to serve as an impartial medical specialist examined the claimant and provided an opinion to resolve a conflict in the medical opinion, the Board found that the associate's opinion could not represent the weight of the medical evidence as the associate was not selected as an impartial medical specialist according to Office procedures); *Vernon E. Gaskins*, 39 ECAB 746 (1988); *William C. Iadipaolo*, 39 ECAB 530 (1988); *Leonard W. Waggoner*, 37 ECAB 676 (1988).